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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 505

LESTER A. CRANCER and GEORGE B. FLEISCHMAN, Co-Partners, Doing Business Under the Firm Names of Valley Steel Products Company and Mid-Valley Steel Company, Respectively, *Petitioners and Appellants Below,*

VS.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation, *Respondents and Appellees Below.*

RESPONDENTS' BRIEF.

WILLIAM S. HOGSETT,
HALE HOUTS,
2900 Fidelity Building,
Kansas City, Missouri,
Counsel for Respondents.

FRANK T RILEY PUB CO KANSAS CITY MO

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RESPONDENTS' BRIEF.

THE OPINIONS OF THE COURTS BELOW.

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals is reported, *Crancer, et al.* v. *Lowden, et al.*, 8 Cir., 121 F. (2d) 645.

JURISDICTION.

Respondents respectfully insist that the petition for certiorari does not present a question for review by this Court.

STATEMENT OF THE CASE.

Petitioners have served no brief since their petition was granted. This brief will therefore be directed to their petition and their brief filed therewith.

Petitioners' statement of the matter involved is inaccurate, incomplete and obscure.

The case is well stated by the Circuit Court of Appeals in its opinion (R. 341-346, 121 F. (2d)), from which we quote, with footnotes citing supporting pages of the record, as follows:

> "This appeal is from a judgment in favor of the Trustees of the Chicago, Rock Island and Pacific Railroad Company, and against appellants, Lester A. Crancer and George B. Fleischman, co-partners doing business under the firm names of Valley Steel Products Company and the Mid-Valley Steel Company respectively, for shipping charges on steel pipe thread protectors. The case was tried without a jury. At the conclusion of the trial the Court made findings of fact and stated conclusions of law, in writing, and entered judgment in favor of appellees for the sum of $2,263.47.[1]
>
> "The present controversy involves the proper classification of the commodity under the existing tariffs.[2] The shipments, seven car loads, moved from points in Montana, Texas, California and Louisiana where appellants had billed the cars to themselves at St. Louis, Missouri.[3] The billings classified the contents of the cars as 'scrap iron' and the tariff charge applicable to that classification was paid. When the shipments arrived at St. Louis, appellees' rate clerk

1. (R. 3-10, 29, 32, 292-5, 302-3.)
2. (R. 4-10, 12-13.)
3. (R. 25-29.)

requested the Western Weighing and Inspection Bureau to inspect the contents of the cars. That inspection resulted in a rating of the shipments as pipe fittings.[4] The classification 'pipe fittings' included thread or pipe protector rings.[5] The tariff rate on scrap iron being less than the rate on pipe thread protector rings, demand was made upon appellants for the difference on the tariff. Refusal to comply with that demand resulted in this action.[6]

* * * * *

"The commodity in question, referred to in various terms such as 'pipe protectors,' 'pipe fittings,' 'pipe thread protectors,' 'protecting rings,'[7] were found by the trial court to be used 'iron pipe thread protecting rings.'[8] These articles are used to protect the threads and the ends of pipe from injury in handling or shipment.[9] Appellants are engaged in the business of purchasing the used articles, repairing and re-selling them. All of the shipments were of the used articles which were being sent to appellants' plant at St. Louis.[10] The repairing or reconditioning process consisted in a general way in a patented process of straightening those which were not too badly damaged and refinishing the threads. The remainder were useless except for re-melting.[11] One of the appellants, testifying on direct examination, indicated that approximately ninety per cent of the articles contained in these shipments could possibly be repaired for use.[12] On cross examination he stated that approximately sixty per cent were repaired and the remaining forty per cent discarded for re-melting.[13] There was other evidence to the same effect.[14] The articles were shipped in open coal cars. The good and bad were co-mingled, were

4. (R. 36-40, 133.)
5. (R. 109, 110, 112-122, 128-137, 190-196.)
6. (R. 25-29.)
7. (R. 42, 55, 90, 93, 123.)
8. (R. 293.)
9. (R. 42, 90, 92, 123.)
10. (R. 215-223, 220-238, 245.)
11. (R. 199-209.)
12. (R. 210-211.)
13. (R. 237.)
14. (R. 161-176.)

loose in the cars, and none were bound or tied together in any way.[15] The tariff contained a provision that when a number of different articles were co-mingled in a car all should take the rating of the highest classed or rated article in the car.[16] The reclassification was based upon the following item of the tariff: 'Pipe Fittings:—rings, thread protecting, iron in packages.'[17] Appellants' proof tended to show that the thread protecting rings were made of steel. It is their contention that therefore the commodity did not fall within the classification of 'iron' pipe thread protecting rings. Numerous metal objects were elsewhere classified under the heading 'Iron or Steel.' That heading does not appear above the item 'Pipe Fittings' quoted above. There is, however, a tariff provision as follows: 'Unless the contrary appears, the word "iron" wherever used in this classification includes, also, steel; and vice-versa.'[18] Another provision of the tariff provided for a ten per cent penalty for shipment of articles such as these loose or uncrated and not in packages.[19] There was no difference in tariff rates on new and on used pipe protecting rings.[20]

"The classification relating to scrap iron provided that it should apply only to iron or steel having value for remelting purposes only.[21] . . .

. . . . . .

"The trial court found that the shipments were not of scrap iron or steel possessing value only for re-melting purposes, but were of used 'iron pipe thread protecting rings.'[22] . . .

. . . . . .

"The argument is advanced that the finding should be set aside because there was no proof that

15. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-142.)
16. (R. 130-131, 190-196.)
17. (R. 109, 110, 112-122, 128-137, 190-196.)
18. (R. 153, 286.)
19. (R. 113-119, 121, 128-9, 190-196.)
20. (R. 194, 290.)
21. (R. 132-3, 157-9, 190-196, 285-292.)
22. (R. 293, 294.)

the articles had a market or commercial value for any purpose other than for remelting. Appellants' evidence showed that these seven and a great many more carloads of pipe thread protectors were purchased by them for reconditioning purposes.[23] There was substantial evidence that a fairly well established price existed for used pipe thread protectors in the territory where they were available.[24] * * *

* * * * *

"* * * In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron.[25] * * *

* * * * *

"The evidence is uncontroverted that the major portion of each car load of the shipments involved were used pipe thread protecting rings and were shipped loose and commingled in the cars.[26] As heretofore demonstrated the proof justified the classification of the major portion of each shipment as pipe fittings consisting of used iron pipe thread protecting rings and not as scrap iron having a value for remelting purposes only.

"The Tariff heretofore quoted in the margin provided that when articles were shipped in a mixed carload the classification applicable to the highest classed or rated article in the car should apply.[27] * * *"

As stated by petitioners, respondents, plaintiffs in the District Court, introduced in evidence at the trial, over objection of petitioners, defendants, the opinion and report

23. (R. 199-209, 220-238, 245, 257-268.)
24. (R. 161-176, 220-238, 245.)
25. (R. 161-176, 199-209, 220-238, 245.)
26. (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 138-9, 142, 210-211, 237.)
27. (R. 130-131.)

of the Interstate Commerce Commission in the case of *Crancer, et al.* v. *Abilene & Southern Railway Company, et al.*, 223 I. C. C. 375 (R. 190-195). That case involved a complaint before the Commission, filed by the defendants against a number of railroads, in which the defendants asserted that shipments of iron or steel thread protecting rings similar to the shipments involved in the case at bar should be classified under the freight tariffs as scrap iron and that class or commodity rates on pipe fittings were inapplicable and unreasonable. The Commission, on August 6, 1937, held scrap iron rates inapplicable and class or commodity rates on pipe fittings applicable and reasonable, and dismissed the complaint (R. 190-195, 223 I. C. C. 375).

It may also be stated that on March 10, 1939, the defendants filed with the Interstate Commerce Commission another complaint similar to the one dismissed by the Commission on August 6, 1937, again complaining that rates on used iron or steel pipe fitting protecting rings in excess of scrap iron rates were unreasonable and inapplicable (R. 14, 17-24); that by motion for stay filed and denied in the District Court before trial (R. 14, 24-25), by application to the Circuit Court of Appeals for prohibition filed and denied by that Court before trial (R. 25, 33), and by objection made and overruled at the beginning of the trial of the case at bar on January 31, 1940, to February 7, 1940 (R. 32-34), defendants sought the postponement or stay of the trial of the case until the determination by the Interstate Commerce Commission of the second last mentioned complaint of defendants.

At page 6 of their petition petitioners refer to a decision of the Interstate Commerce Commission on February 18, 1941, upon the said second complaint of the petitioners before the Commission, and attach as an ap-

pendix to their petition and brief, pages 23 to 34, the decision of the Commission so referred to, in which it was again held that scrap iron rates were not applicable to shipments such as those in suit but that class or commodity rates were in part unreasonable.

The reference to this decision of the Interstate Commerce Commission of February 18, 1941, following the completion of the trial in the case at bar and the judgment entered on February 7, 1940 (R. 302-3), is of course a reference to matter outside of the record. The reference to this decision of the Interstate Commerce Commission as an effective and current ruling of the Commission is also lacking in candor. As appears from a certified copy of the subsequent proceedings of the Commission, which we have filed with the clerk of this Court, the decision of February 18, 1941, was suspended and the case set down for further hearing.

ARGUMENT.

The petition for certiorari (page 7) refers the Court to the rambling and obscure statement of the "Matter Involved" for the "Questions Presented." As "Reasons Relied On for the Allowance of the Writ," the petition merely avers that the opinion of the Circuit Court of Appeals decided a Federal question in a way in conflict with applicable decisions of this Court and cites a number of decisions, without indicating the questions ruled or the respect in which it is claimed that the opinion of the Circuit Court of Appeals is in conflict with the decisions cited, other than to refer the Court to the brief of petitioners in support of the petition. The brief (pages 9 to 21) sets out and argues three specifications of error. Paragraph 2 of Rule 38 of this Court permits a brief in support of a petition for certiorari, but the petition must be complete in itself and the requirements for the petition prescribed by the rule cannot be supplied by the supporting brief. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177-8; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 357.

If however, the petition be deemed sufficient to raise the points mentioned and argued in petitioners' brief, we respectfully insist that the points are without merit and present no question for review by this Court. We discuss them in the order in which they are set out in petitioners' brief.

I.

The Circuit Court of Appeals did not err in sustaining the judgment for additional freight charges. The

findings of fact and judgment were supported by evidence that a substantial and major portion of each shipment was used pipe thread protecting rings, having an established market value as such and not of value for remelting purposes only, as well as by evidence that the shipments in question and all other shipments were purchased by defendants for reconditioning and sale without remelting, and that from sixty to ninety per cent of each of the shipments in question were actually reconditioned by defendants for resale, without remelting. The Circuit Court of Appeals ruled in conformity with the applicable decisions of this Court and not in conflict with any of its decisions.

Petitioners argue that the District Court "must have based its judgment upon the theory" that the shipments were not scrap "because they were not used as scrap for remelting purposes only," because the trial court stated orally at the trial that he did not think that the shipments were "scrap iron" and observed that "the course of dealing, over a long period of time, shows that, as a matter of fact, it never was used in that way" (R. 292).

The trial court expressly found (R. 293-4), and the evidence abundantly established, that the tariffs applicable to all the shipments provided rates for shipments of pipe fittings described as iron or steel thread protecting rings (R. 109, 110, 112-122, 128-137, 190-196); that the tariffs provided that when a number of different articles were commingled in a car all should take the rating of the highest classed or rated article in the car (R. 130-131, 190-196); that each of the carload shipments involved contained iron or steel thread protecting rings so described in the tariffs (R. 47, 52-3, 72, 82-3, 88, 90-93, 96, 103, 123, 127, 132-9, 142); that the tariffs applicable to shipments between the points in question provided that ratings on scrap iron or steel applied only to iron or steel having value for remelting purposes only (R.

132-3, 157-9, 190-196, 285-292); that the iron or steel thread protecting rings in the seven shipments were not iron or steel having value for remelting purposes only (R. 47, 52-3, 82-3, 88, 90-93, 103, 123, 127, 138-9, 161-176, 199-209, 220-238, ~~245~~ 254).

These findings of fact are abundantly supported by the evidence. Indeed, there was no evidence to the contrary and petitioners do not contend for any.

As pointed out by the Circuit Court of Appeals (R. 344-5), the findings that the shipments were used thread protecting rings and not scrap iron or steel of value for remelting purposes only, are supported not only by defendants' own evidence that the shipments in question and a great many similar shipments were purchased by defendants for reconditioning purposes without remelting and from sixty to ninety per cent of each of the shipments in question were actually reconditioned for resale as used protecting rings by defendants without remelting (R. 199-209, 220-238, ~~245~~ 254, 257-268), but also by an abundance of evidence (by both parties) to the effect that the articles were used pipe thread protectives, having an established market value as such, as distinguished from mere scrap iron (R. 161-176, 199-209, 220-238, ~~245~~ 254).

Petitioners could not complain of the findings of fact and judgment even if the testimony as to the purpose for which petitioners were buying the shipments in question and other shipments, and the use to which they in fact put these shipments and other similar shipments, had been incompetent and inadmissible, since, as above pointed out, the findings and judgment were amply supported by other evidence, of both parties, that the shipments in question contained pipe thread protecting rings having an established market value as such, as distinguished from mere scrap iron (R. 161-

176, 199-209, 220-238, 245). Rule 61, Federal Rules of Civil Procedure; *Martin* v. *Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co.* v. *Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson* v. *United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall* v. *United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co.* v. *McLaughlin*, 9 Cir., 85 F. (2d) 606, 609. Supported as they are by substantial and abundant competent evidence the concurrent findings of fact of the District Court and the Circuit Court of Appeals are conclusive. *Virginian Railway Co.* v. *Federation*, 300 U. S. 515, 542, and cases cited; *United States* v. *O'Donnell*, 303 U. S. 501, 508, and cases cited; Rule 52(a) Federal Rules of Civil Procedure.

There is, however, no merit to the contention of petitioners that the evidence as to the use to which the shipments in question and other shipments were put was not competent and material, and proper basis for a finding that the shipments in question were not scrap iron, having value for remelting purposes only.

In support of their argument petitioners cite two decisions by this Court, *Interstate Commerce Commission* v. *Delaware, Lackawanna & Western Railroad*, 220 U. S. 235, and *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 225 U. S. 326. In the Lackawanna case it was held that the manner in which shipments of definitely identified articles were owned and assembled for shipment in one car could not change the shipment from a carload shipment as designated in the tariffs. In the Baltimore & Ohio case it was held that the mere fact that coal which was the subject of shipment belonged to a railroad could not change or destroy the classification of the coal under the tariffs; that the tariffs provided rates for the shipment of coal regardless of whether owned by a dealer or a railroad.

Neither of these cases has any application or in anywise supports petitioners' argument. The character and classification of the articles in shipment, under the tariffs, was a matter in dispute in the case at bar. The evidence as to the use for which the articles were purchased and to which they were put, was material and competent, not for the purpose of changing the character and classification of the articles, but for the purpose of determining their character and classification. The two decisions cited by petitioners do not hold, and this Court has never held, that the use to which articles are put is not some evidence of the character of the articles.

It is not necessary to consider whether the two Interstate Commerce Commission cases cited on pages 12 and 13 of petitioners' brief support petitioners' contention. If they did there would still be involved no ruling of the Circuit Court of Appeals in conflict with applicable decisions of this Court. Nor would they establish any applicable rule or decision of the Interstate Commerce Commission. In the more recent decisions of the Commission upon the very question now raised by petitioners, upon the petitioners' own complaint, the Commission ruled the contention against petitioners:

> "In *Wisconsin Waste & Wiper Co. v. Chicago & N. W. Ry. Co.*, 196 I. C. C. 459, 460, Division 5 said the use to which a commodity is put is not determinative of the applicable rate, but that the use may be considered in determining the nature of the commodity" (*Crancer, et al.* v. *Abilene & Southern Railway Co.*, 223 I. C. C. 375, R. 192).

At page 10 of their brief petitioners refer to testimony by one of the petitioners that he assembled at petitioners' plant and loaded and shipped to a mill for remelting purposes a car of thread protectors (R. 247-8). Petitioners themselves thus appear to argue that the use to which this particular car of thread protectors was

put, to-wit, remelting, established the character of the shipment as scrap iron, having value for remelting purposes only. We concede that the use for which it was shipped and to which it was put was evidence that that particular shipment was scrap iron. The shipment so testified to by the petitioner was doubtless a shipment of rings which he could not recondition and which was therefore, in fact of value for remelting purposes only, and, therefore, scrap iron. Petitioner did not testify that this car which he shipped as scrap iron was made up of any of the protectors involved in the shipments in question, nor would it have mattered if it had been, since the shipments in suit contained substantial quantities of thread protectors which had value other than for remelting purposes and since the highest classified article controlled as to the rate on each car.

It is of course to be pointed out that the evidence as to the use for which the shipments in question and other shipments of like character were put was not merely evidence of a casual or accidental use. On the contrary, the evidence in question was to the effect that the shipments in question and many other similar shipments were purchased by defendants for the purpose of reconditioning, without remelting, and that from sixty to ninety per cent of the shipments in question and other shipments of like character to petitioners and others over a period of years were capable of being reconditioned and were in fact reconditioned without remelting, for sale as used thread protecting rings. (R. 199-209, 220-238, 245, 257-268, 161-176).

The Circuit Court of Appeals disposed of the contention of petitioners in the following manner (R. 345-6, 121 F. (2d) 649):

> "It is further contended that the finding that the pipe thread protectors did not possess a commercial or market value for remelting purposes only,

was based solely upon testimony that appellants purchased the articles for reconditioning purposes and not for remelting purposes. Obviously, if the articles were scrap iron fit for remelting purposes only, their purchase by appellants for another purpose would not change the character of the articles. Nor should one rate be applied to the shipment of an article to be used for one purpose and another rate be applied to the shipment of the same article when it is to be used for another purpose. *Interstate Commerce Commission* v. *Baltimore & Ohio Ry. Co.*, 225 U. S. 326. But evidence of the use for which the articles were purchased and the use to which they were actually put was properly considered in determining what they actually were. In addition to the evidence showing the purpose for which appellants purchased the articles and the use to which they were put, there is an abundance of testimony to the effect that the articles were used pipe thread protectors, having an established market value as such, as distinguished from mere scrap iron. If, as in *A. T. & S. F. R. Co., et al.* v. *U. S. ex rel. Sonken-Galamba Co.*, 98 F. (2d) 457, it had been conceded that the articles had no commercial value except for remelting purposes, or, as in *I. C. C.* v. *Baltimore & Ohio R. Co., supra*, the character of the commodity was uncontroverted, the mere fact that appellants had inadvertently paid more for the articles than they were worth for remelting purposes or purchased them for reconditioning purposes when in fact the articles were actually only scrap iron having a value only for remelting purposes, would not change their conceded value or uncontroverted character. But such is not the present case. Here, both the value of the articles and their character were disputed issues. In fact the determination of those issues was of controlling importance. A preponderance of the evidence supports the finding of the trial court both as to the value of the articles and their character."

It is submitted that the Circuit Court of Appeals ruled soundly and without conflict with any decision of

this Court; that the first specification of petitioners' brief is without merit and presents no question for review by this Court.

II.

The Circuit Court of Appeals did not err in the holding that no reversible error was committed in admitting in evidence the decision of the Interstate Commerce Commission in Crancer, et al. v. Abilene & Southern Ry. Co., et al., 223 I. C. C. 375 (R. 190-195), and the ruling presents no question for review.

Petitioners appear to argue that the decision of the Interstate Commerce Commission upon their complaint of the reasonableness of class or commodity rates upon shipments similar to those in the case at bar, determined against them by the Commission on August 6, 1937 (223 I. C. C. 375, R. 190-195), was inadmissible because it was not *res adjudicata* as to character of the shipments and the applicable rates in the case at bar. They cite no decision of this Court on the point and rely solely upon a District Court decision cited on page 16 of their brief to the effect that a judgment as to the character of one shipment is not *res adjudicata* as to the character of another shipment.

Of course the Interstate Commerce Commission decision in question was not *res adjudicata* as to the character of the shipments in question. It was not offered as determining that issue but merely as evidence of the valid tariff provisions (R. 189, 190, 195). It was competent evidence and clearly admissible. *Lowden, et al.*, v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 519-520; *A. J. Phillips Co.* v. *Grand Trunk W. Ry. Co.*, 236 U. S. 662, 664; *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506, 511, 512.

The Circuit Court of Appeals sufficiently disposed of the point as follows (R. 347):

"Since the case was tried without a jury, we can see no possible prejudice to appellants by the consideration of the opinion of the Commission by the Court as evidence, rather than by an examination of the same opinion in his library. There is no suggestion that the latter course would have been improper. The trial court did not treat the opinion as being *res adjudicata*. There was no error in calling it to the Court's attention."

Even had the admission of the decision been error, the error would have been harmless since the Court's findings and judgment were supported by sufficient and abundant competent evidence. Rule 61, Federal Rules of Civil Procedure; *Martin* v. *Ihmsen*, 21 Howard 394, 395; *Mammoth Mining Co.* v. *Salt Lake Foundry & Machine Co.*, 151 U. S. 447, 451; *Anderson* v. *United States*, 8 Cir., 65 F. (2d) 870, 872; *Wall* v. *United States*, 10 Cir., 97 F. (2d) 672, 673-4; *Jackson Furniture Co.* v. *McLaughlin*, 9 Cir., 85 F. (2d) 606, 609.

It is submitted that petitioners' Point II is without merit and involves no ground for review by this Court.

III.

Petitioners' specification that the District Court should not have proceeded with the trial of the case while petitioners' second complaint before the Interstate Commerce Commission in respect to the reasonableness of tariff rates was pending, is without merit and raises no question for review by this Court.

The case before the Court is a suit by respondents for *undercharges*, alleged and found to be *due from petitioners under tariffs on file with the Interstate Commerce Commission*. Petitioners are contending that the trial of this case should have been stayed pending the determination by the Interstate Commerce Commission of a *complaint* filed by petitioners *before the Commission*, which asked the Commission *to find and declare the*

tariff rates in question unreasonable and to award reparation as to all charges collected by respondents and other carriers based on the tariffs in question (R. 17-25).

This complaint before the Interstate Commerce Commission, which petitioners contend should have stayed the trial in the case at bar, was the *second complaint* filed by petitioners before the Commission attacking the reasonableness of the *same tariffs*, on the *same grounds*, and as applicable to the *same character of shipments*. The *first complaint was dismissed by the Commission on August* 6, 1937, *in a decision holding the rates not unreasonable* (R. 190-195, *Crancer et al.* v. *Abilene & So. Ry. Co. et al.*, 223 I. C. C. 375). This is the decision of the Commission which petitioners contend, in their Point II, should not have been admitted in evidence.

The shipments in question moved in a period immediately preceding and following the August 6, 1937 decision of the Commission dismissing petitioners' first complaint, to-wit, in June, July and August of 1937 (R. 25-29). It thus appears that petitioners were fully advised of the rate question involved when they made the shipments. In securing the billing of the shipments as scrap iron, without a decision of the Commission declaring the tariff provisions unreasonable, petitioners did not act in good faith, unless the shipments were in fact scrap iron, or unless petitioners believed them to be scrap iron. The evidence disclosed (R. 47, 52-3, 82-3, 88, 90-93, 103, 123, 127, 138-9, 161-176, 199-209, 220-238, 245) and the Court found (R. 294), that they were not in fact scrap iron. Petitioners' own evidence (R. 199-209, 220-238, 245, 257-268), disclosed that petitioners selected and purchased the shipments for reconditioning and resale without remelting, and because, to use the language of the Circuit Court of Appeals, (R. 345, 121

F. (2d) 649) "the articles were used pipe thread protectors having an established market value as such, as distinguished from mere scrap iron."

A three-judge Court dismissed petitioners' bill to enjoin the decision of the Commission on the petitioners' first complaint, *Crancer et al.* v. *United States et al.*, D. C. Mo. 23 F. S. 690. The learned trial judge in the case at bar was a member of that Court and therefore had judicial knowledge of the Commission's decision on the first complaint (*Freshman* v. *Atkins*, 269 U. S. 121, 124). This Court affirmed the decree of the three-judge Court, *Crancer et al.* v. *United States et al.*, 305 U. S. 567.

Petitioners filed their second complaint before the Commission on March 10, 1939 (Petitioners' Brief, p. 17), six days before the institution of the case at bar, on March 16, 1939 (R. 3). The trial court set aside an order which the Court had made granting a continuance of the case, upon a motion of respondents setting out that the petitioners had secured an indefinite continuance of the hearing of their second complaint before the Commission (R. 13-14).

We respectfully submit that the District Court did not exceed its jurisdiction or commit error in refusing to stay the trial of the case on account of the pendency of petitioners' second complaint before the Commission.

The Circuit Court of Appeals disposed of the point that the action should have been stayed as follows (R. 347-8, 121 F. (2d) 650):

> "Appellants' last contention is that the Court should not have proceeded with this trial because there was pending at the time a proceeding before the Interstate Commerce Commission involving the reasonableness of the rates on used pipe thread pro-

tectors. The mere statement of the question suggests the answer. The reasonableness of the rates was not an issue in this case. The issue was one of classification and the application of the existing tariffs in accordance with what the facts disclosed the commodity actually was. 'Until changed the tariffs bound both carriers and shippers with the force of law.' *Lowden* v. *Simonds, etc., Grain Co.*, 306 U. S. 516, l. c. 520. Even if, as indicated by counsel in oral argument, the Interstate Commerce Commission determined that the existing rates prescribed on used pipe thread protectors was unreasonable, fixed another rate therefor, and granted reparation rights, this action does not fail. *Lowden* v. *Simonds, etc., Grain Co., supra.* There was no administrative problem involved, the determination of which is committed to the Interstate Commerce Commission, hence the case of *General American Tank Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, and others of similar import, are inapplicable."

It is submitted that the Circuit Court of Appeals ruled soundly and in accord with all the applicable decisions of this Court.

Of similar effect is the decision of the Second Circuit in *Pennsylvania Ry. Co.* v. *Fox & London*, 2 Cir., 93 F. (2d) 669, 670, certiorari denied 304 U. S. 566. In that case a shipper was sued for undercharges and contended that the Court was without jurisdiction to proceed because the case involved a construction of the published tariffs which required a preliminary determination by the Interstate Commerce Commission. The Circuit Court of Appeals held that there was involved no question of construction requiring determination by the Commission: that the case involved merely a determination of the character of the articles shipped and an application in plain language of the published tariffs. The Second Circuit Court of Appeals pointed out the same distinction between the jurisdiction of the Court and the

jurisdiction of the Commission, which was recognized and followed by the Eighth Circuit Court of Appeals in the case at bar. The District Court was held to have properly exercised jurisdiction, and its judgment for the undercharges sued for was affirmed.

Petitioners' contention that it was "mandatory upon the District Court not to proceed with the trial" pending their second application before the Commission raising the reasonableness of the tariff rates, overlooks the distinction so clearly pointed out by the Circuit Court of Appeals, between the case at bar and a case involving an administrative question such as the Congress has committed in the first instance to the determination of the Interstate Commerce Commission. As pointed out by the Court the case of *General American Tank Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, and others of similar import, relied upon by petitioners, are inapplicable to petitioners' contention.

The earliest case relied upon by petitioners is *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506. That was an action by a shipper against a carrier to recover back part of the tariff charges, collected by the carrier, on the ground that the tariff charges were unreasonable. It was held that only the Interstate Commerce Commission could in the first instance hold that tariffs on file were unreasonable, and that unless and until the Commission had held a tariff unreasonable the courts were required to recognize and enforce the tariff as filed. This case is therefore authority against petitioners. Respondents have sued upon, and the District Court and Circuit Court of Appeals have enforced, the existing tariffs. In contending that the pendency of their complaint before the Commission operated to stay relators' action, the petitioners have put the shoe on the wrong foot. In so far as the petitioners complained

of the reasonableness of the tariffs, it was the petitioners who have no standing in court.

Another case relied upon by petitioners is *Great Northern Ry Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. This was also an action by a shipper against a carrier. The shipper sought to recover part of certain freight charges which had been exacted by the carrier. The carrier contended that the shipper's right to recover depended upon a construction of the tariff which was an administrative question for the determination of the Interstate Commerce Commission in the first instance, and one which could not be passed upon by the Court inasmuch as it had never been determined by the Commission. The Court recognized that if the suit had involved such an administrative question the carrier's position would have been correct, but held that the position was untenable for the reason that the question involved was merely one of the construction of unambiguous language used in its ordinary sense, a question of law for the Court, and not one for the Commission. In the case at bar relators' action for undercharges depended upon no administrative question but merely upon the issue of fact as to whether the articles shipped were used thread protectors within the plain and unambiguous meaning of the tariff provisions, and not scrap iron of value for remelting purposes only.

As said by the Circuit Court of Appeals (R. 347, 121 F. (2d) 650):

> "* * * The reasonableness of the rates were not an issue in this case. The issue was one of classification and the application of the existing tariffs in accordance with what the facts disclosed the commodity actually was."

Furthermore, if the tariffs involved in the case could be said to present a case for construction by the

Interstate Commerce Commission, the construction was already made by the Commission when it dismissed petitioners' first complaint (R. 190-195, *Crancer et al.* v. *Abilene & So. Ry. Co. et al.*, 223 I. C. C. 375, review denied *Crancer et al.* v. *United States et al.*, D. C. Mo. 23 F. S. 390, affirmed 307 U. S. 567). The judgment appealed from was based on the same construction (R. 293-5), when the Court determined that the shipments in question were iron or steel pipe thread protecting rings, and not iron or steel having value for remelting purposes only (R. 294).

Another case relied upon by petitioners, *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, was also an action by a shipper against a carrier for damages. The shipper's right to relief depended upon the construction of words of a tariff which were not used in their ordinary meaning and therefore presented an administrative question which had to be first determined by the Interstate Commerce Commission. This case is distinguished by *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. l. c. 294, and what has been said above in pointing out that the Great Northern case does not support petitioners' position.

General American Tank Corp. v. *Eldorado Terminal Co.*, 308 U. S. 422, the remaining case cited by petitioners, was an action by a shipper to recover compensation for freight cars furnished for transportation of its products. Under the existing tariffs and rules of the Interstate Commerce Commission compensation for the use of the cars was required to be paid to the car company from which the shipper leased them. This Court held that the shipper must first apply to the Interstate Commerce Commission and obtain a change by the Commission in the tariffs and rules, before relief could be obtained (308 U. S., l. c. 431). In other words, the shipper had to ob-

tain relief from the Commission in the first instance because it was seeking relief contrary to the existing tariffs and rules of the Commission.

None of petitioners' cases, therefore, supports their position.

As was held by the Circuit Court of Appeals, unless and until tariffs filed with the Commission have been superseded by a final order of the Commission the tariff rate is the lawful rate, it is the duty of the carrier to collect the full tariff rate, and unlawful for the carrier to acquiesce in anything less than the full tariff rate. *Pennsylvania R. R.* v. *International Coal & Mining Co.*, 230 U. S. 184, 197; *Lowden, et al., Trustees* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520.

In the *International Coal Mining Company* case the Court said (230 U. S., l. c. 197):

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

In the *Lowden* case the Court said (306 U. S. 520):

> "Until changed, tariffs bind both carriers and shippers with force of law."

If the carrier has collected less than the current tariff rate it is its duty to sue for the balance and there is no defense to such suit. *Pittsburgh, etc., R. R.* v. *Fink*, 250 U. S. 577.

It was the right and the duty of the respondents to enforce the lawful rates fixed by the existing tariffs.

They have exercised that right and fulfilled that duty, and obtained a judgment based upon the existing tariffs for lawful charges fixed thereby.

Petitioners have attached as an appendix to their petition and brief, pages 23 to 34, a decision of the Commission upon petitioners' last complaint of the reasonableness of the existing tariffs, handed down by the Commission on February 18, 1941. In their petition and also at page 18 of their brief they refer to it as an effective and current ruling of the Commission, although as pointed out in our statement of the case a certified copy of the subsequent proceedings of the Commission which we have filed with the clerk of this Court discloses that the decision has been suspended and the case set down for further hearing. If this decision of the Commission were final the reference to it would be outside the record and the decision could not be considered for the purpose of impeaching the judgment which became final before it was rendered. *Realty Acceptance Corp.* v. *Montgomery*, 284 U. S. 547, 551. If it were a final decision petitioners would have a complete remedy under it by way of reparation upon payment of the judgment in question. *Pennsylvania Railroad* v. *International Coal & Mining Co.*, 230 U. S. 184, 197. If petitioners finally succeed in obtaining some modification of the tariffs by the Commission, which would affect the charges here in judgment, petitioners will have a complete remedy by reparation to the extent of the modification of the rates granted. It is to be observed that the decision of the Commission of February 18, 1941, referred to by petitioners, holds against petitioners' claim that scrap iron rates are applicable but names an intermediate rate as reasonable. Should such a ruling finally be adopted and become final petitioners would be entitled to reparation only as to part of the judgment here involved.

Petitioners say that the trial should have been stayed "as a matter of comity between the courts of this country and the Interstate Commerce Commission."

There was no matter of comity involved. The jurisdiction of the District Court was invoked by suit to enforce the existing tariffs. Such jurisdiction was conferred on the District Court by Section 24 (8) of the Judicial Code (28 U. S. C., Sec. 41) (8). This suit for undercharges was a matter of which the Interstate Commerce Commission has no jurisdiction.

On the other hand, the jurisdiction of the Interstate Commerce Commission over the question of reasonableness of tariff rates raised by petitioners' complaint before the Commission was jurisdiction conferred exclusively on the Commission in the first instance, both as to fixing rates (49 U. S. C., Sections 13 (1) and 15 (7)) and as to reparation on account of tariff charges already collected (49 U. S. C., Sections 13 (1) and 16 (1)).

The jurisdiction of the Interstate Commerce Commission under the second complaint filed by petitioners has been in no wise interfered with by the action of the District Court in rendering judgment for relators for undercharges due under the tariffs as published. To borrow the language of this Court "the only relief" which could be "afforded" petitioners "by the Commission's decision" of the pending complaint of petitioners "is a right to reparation for" the payment under the judgment in the case at bar to such extent as the Commission might find unreasonable the rates upon which the judgment was based (*Lowden, et al. v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 521).

While it is clear that the affirmance of the judgment of the District Court could not preclude reparation by the Commission in the event the Commission should find the tariffs in question unreasonable to any extent,

the Circuit Court of Appeals was careful to leave no uncertainty about the matter and very properly affirmed the judgment "without prejudice to such rights as appellants may have or become entitled to for reparation" (R. 348, 121 F. (2d) 650).

It being clear that the District Court had jurisdiction, the question of postponement of the trial involved at most the convenience of the Court and the parties and was at most a matter within the sound discretion of the District Court. It is well settled that the granting or refusing of a continuance is within the discretion of the trial court and not to be interfered with on appeal unless there has been a clear abuse of the discretion. *Guardian Assurance Co.* v. *Quintana*, 227 U. S. 100.

After the District Court had granted the petitioners a continuance, the Court was clearly justified in setting aside the order when it was made to appear that the petitioners had secured an indefinite continuance of their complaint before the Commission (R. 13-14).

In prosecuting the action for undercharges respondents were complying with the law prohibiting discrimination between shippers and seeking to enforce the published tariffs which had the force and effect of statute. The answer of petitioners denied all the allegations of the complaint (R. 12). By requested findings of fact and conclusions of law (R. 295-302) petitioners sought to have the District Court find that the articles shipped were scrap iron within the meaning of the published tariffs, and that no undercharges were shown under the existing tariffs. In the Circuit Court of Appeals (R. 342, 121 F. (2d) 647) petitioners continued to defend, and sought reversal of the judgment, on the ground that the shipments had not been proved to contain articles for which the published tariffs fixed a rate in excess of the scrap iron rate which petitioners had paid. In this

Court by their Points I and II they are still contending that the District Court erred in holding that the shipments were of such character that class or commodity rates, as distinguished from scrap iron rates, were applicable.

In other words, it conclusively appears that petitioners defended upon the merits and under the published tariffs, although they also sought a stay of the action on account of their complaint to the Commission that the tariffs were unreasonable. It was the duty of the relators, in the prosecution of their action and enforcement of the legal tariffs, to prove that the articles shipped were of a character to which the tariff rates sued upon applied. It was the duty of relators to seek, and the right of relators to be accorded a trial while evidence of the character of the articles shipped was available. Just as it was the duty of relators to prosecute the action with diligence, so it was the duty of the District Court to accord relators a prompt trial. Speaking of the duty of the Courts in such litigations this Court said, in *Lowden, et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 521:

> "It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates."

We believe it would have been an abuse of discretion for the trial court to have stayed the trial pending petitioners' complaint to the Commission of the reasonableness of the rate. Certain it is, we respectfully submit, that the refusal of the trial court to stay the action did not constitute an abuse of discretion. The correctness of our position is emphasized by the fact that the *Commission had already ruled* that the tariff rates in question were *not unreasonable*, when it *dismissed* petitioners'

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first complaint on August 6, 1937 (R. 190-195, *Crancer, et al. v. Abilene & So. Ry. Co., et al.*, 223 I. C. C. 375).

Since petitioners have a complete and adequate remedy, by way of reparation, in the event they succeed, to any extent, in their efforts to have the Interstate Commerce Commission declare the tariff provisions in question unreasonable, it is manifest that petitioners have suffered no prejudice by the action of the trial court in refusing the prosecution of the stay of the case at bar. Now that relators have obtained a judgment for the lawful charges, after having been put to the expense of proving their case on the merits, we respectfully submit that it would be unjust to relators to reverse their judgment, to require them to pay the costs of the case to date, and to make it necessary for them to again prove their case on the merits after the petitioners' complaint before the Commission has been finally determined. Even more serious, we respectfully submit, would be the effect of a reversal upon the enforcement of the law which requires the collection of legal freight charges promptly and without discrimination. We respectfully submit that if a suit for undercharges due under the existing tariffs could be stayed by the mere filing of a complaint to the Interstate Commerce Commission attacking the reasonableness of the published rates, and even a second complaint after prior adverse ruling of the Commission, uniform enforcement of the law would be impaired and discrimination would necessarily result.

It is submitted that the Circuit Court of Appeals soundly ruled the question.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

WILLIAM S. HOGSETT,
HALE HOUTS,
2900 Fidelity Building,
Kansas City, Missouri,

Counsel for Respondents, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company, a Corporation.

Kansas City, Missouri,
January 22, 1942.